84-18

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NO:

IN THE SUPREME COURT OF THE
UNITED STATES

TERM,

TALAMINI, Florence, Administratrix of the Estate of John A. Talamini, Deceased
Appellant

VS

ALLSTATE INSURANCE COMPANY
Appellee

APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD
CIRCUIT

JURISDICTIONAL STATEMENT

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132 pp

QUESTIONS PRESENTED

A. Whether the U.S. Court of Appeals for the Third Circuit committed error by dismissing Plaintiff/Appellant's Appeal on the grounds that it lacked jurisdiction to hear the Appeal?

B. Whether Plaintiff/Appellant has been denied due process of law as to Count II of her Complaint by virtue of the cumulative effect of the U.S. District Court for the Eastern District of Pennsylvania's dismissal of Count II and the Court of Appeals' dismissal of her Appeal?

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NO:

IN THE SUPREME COURT OF THE
UNITED STATES

TERM,

TALAMINI, Florence, Administratrix of the Estate of John A. Talamini, Deceased	:
Appellant	:
VS	:
ALLSTATE INSURANCE COMPANY	:
Appellee	

I. Statement of Jurisdiction

This Appeal is taken pursuant to 28 U.S.C.A. §1254 from the denial of an appeal by the United States Court of Appeals for the Third Circuit on October 24, 1983, of an action in assumpsit which was originally removed to the United States District Court for the Eastern District of Pennsylvania under 28

U.S.C.A. §1441, whose jurisdiction was based on the diversity of citizenship of the parties under 28 U.S.C.A. §1332. Notice of Appeal to the Supreme Court of the United States was filed by Appellant on January 23, 1984, with the U.S. Court of Appeals for the Third Circuit.

II. Statement of the Case

Florence Talamini, ("Talamini") as Administratrix of the Estate of John A. Talamini, Deceased ("Decedent"), brought an action in assumpsit on behalf of the Estate of John A. Talamini. On or about December 10, 1981, Talamini's decedent was a passenger in an automobile owned by Joseph F. Pelligrino ("Pelligrino") which was involved in an automobile accident. Allstate insured Pelligrino's vehicle, with Joseph F. Pelligrino as the named insured. As a direct and proximate result of the accident, Talamini's decedent was injured and required medical attention and treatment. John A. Talamini subsequently died. As a direct and proximate result of the accident and his subsequent death, Talamini's decedent lost the wages of his employment. In

addition, Talamini, as wife of the decedent and as a direct and proximate result of the accident, lost the income of the decedent, which would have been contributed to her if the decedent had not sustained fatal injuries, and, consequently, claimed entitlement to survivor's loss benefits. In addition, Talamini incurred reasonable expenses directly related to the decedent's funeral and burial.

Pursuant to the Pennsylvania No-Fault Motor Vehicle Insurance Act ("No-Fault Act"), 40 Pa. C.S.A §1009 et seq., Talamini sought coverage and payment of No-Fault benefits from Allstate. A copy of the Act is attached hereto and is contained in Appellant's Appendix at p. A17. Under the No-Fault Act, Allstate was obliged to provide

coverage and payment of No-Fault benefits to Talamini. On April 11, 1983, Talamini submitted a claim for No-Fault benefits. Allstate did not communicate a decision to Talamini on her claim. Thereupon, Talamini instituted an action in the Philadelphia County Court of Common Pleas to recover the benefits due her under the No-Fault Act (Count I of Talamini's Complaint) and, in addition, pleaded a right to recover under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (Count II of Talamini's Complaint). (Hereinafter referred to as "the Law"). 73 Pa. C.S.A. §201-1 et seq. A copy of the Law is attached hereto and is contained in Appellant's Appendix at p. A89. Talamini claimed in Count II of her Complaint that Allstate had violated the Law in two respects: (1) that

Allstate had engaged in unfair methods of competition and/or unfair or deceptive acts or practices in the conduct of any trade or commerce in violation of §201-3 of the Law; and (2) that Allstate had engaged in fraudulent conduct which had created a likelihood of confusion or of misunderstanding in violation of §201-2(XVii) of the Law, supra. Talamini cited as her basis for the aforesaid violations, Allstate's continued denial of payment of No-Fault benefits due to her as well as Allstate's failure to settle her claim in a prompt, fair and equitable fashion. Allstate subsequently removed the case to the United States District Court for the Eastern District of Pennsylvania, alleging diversity of citizenship as the basis for the District Court's jurisdiction over the subject

matter of the action. 28 U.S.C.A. §1332. See Appellant's Appendix at p. A15.

Subsequently, Allstate filed a Motion to Dismiss under Rule 12 (b)(6) of the Federal Rules of Civil Procedure [28 U.S.C.A. Rule 12 (b)(6)] as to Ccunt II of Talamini's Complaint in Assumpsit with the District Court, wherein a claim for relief under the Consumer Protection Law, supra, was contained. On August 15, 1983, said Motion was granted. See Appellant's Appendix at p. A3.

On August 18, 1983, Plaintiff/ Appellant filed a Notice of Appeal with the District Court. Thereafter, on October 4, 1983, Appellee filed a Motion to Dismiss Plaintiff/ Appellant's Appeal with the U.S. Court of Appeals for the Third Circuit. Appellant's Brief and Response to

Appellee's Motion to Dismiss was subsequently filed on October 11, 1983. On October 24, 1983, the Court of Appeals dismissed Plaintiff/Appellant's Appeal on the ground that it lacked jurisdiction to hear the appeal. A copy of the Court of Appeals' Order is attached hereto and is contained in Appellant's Appendix at p. A1. Subsequently, Appellant filed a Notice of Appeal on January 23, 1984 with the U.S. Court of Appeals for the Third Circuit.

III. Need for Plenary Consideration

Plaintiff/Appellant now appeals the decision of the Court of Appeals under 28 U.S.C.A §1254 (See Appellant's Appendix at p. A12) on the grounds that: (1) the Court of Appeals erred in dismissing Plaintiff/Appellant's Appeal and (2) Appellant has been denied due process of law under the 5th Amendment to the United States Constitution as a result of the District Court's dismissal of Count II of her Complaint and the Court of Appeals' dismissal of her Appeal. The 5th Amendment provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall

> be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S.C.A. Constitution, Amendment V.

Appellant has been denied her right to due process of law by virtue of the fact that she has been deprived of her opportunity to be heard as to Count II of her Complaint "at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L.Ed.2d. 18 (1976).

In dismissing Appellant's Appeal, it is presumed that the Court of Appeals relied on Appellee's argument that the decision of the District Court was not sufficiently final to warrant the Court of Appeals' assertion of subject matter jurisdiction over this matter. The

Pennsylvania Supreme Court, in Bell v. Beneficial Consumer Discount Company, 465 Pa. 225, 348 A.2d 734 (1975), relying on the United States Supreme Court's holding in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 1226, 93 L.Ed. 1528 (1949) held that:

> Whether an order is final and appealable cannot necessarily be ascertained from the face of a decree alone, nor simply from the technical effect of the adjudication. The finality of an order is a judicial conclusion which can be reached only after an examination of its ramifications. We follow the reasoning of the United States Supreme Court that a finding of finality must be the result of a practical rather than a technical construction. Cohen, supra. (Emphasis added).

Therefore, the test is whether the order in its "practical aspect" is sufficiently final to be appealable. Bell, supra. If the practical consequence of the order by the trial court is effectively to put an

appellant "out of court" the order will be treated as final. Ventura v. Skylark Motel, Inc., 431 Pa. 459, 463, 246 A.2d 353, 355 (1968). Similarly, an order is "final" if it precludes a party from presenting the merits of his claim to the lower court. Pugar v. Greco, 483 Pa. 68, 394 A.2d 542 (1978); Marino Estate, 440 Pa. 492, 494, 269 A.2d 645, 646 (1970).

In R.B. Equipment Company v. Williams, Shields, Snyder and Gous, 304 Pa. Super. 31, 450 A.2d 85 (1982), Judge Montemuro, in a strong dissenting opinion stated the following:

> In Commonwealth v. Osatti, 448 Pa. 72, 74-75, 292 A.2d 313, 315 (1972), the Supreme Court refused to quash an appeal and stated in pertinent part:
>
> '...we do not mean to suggest that a final judgment on the original issue raised by the complaint could not have been awaited by the Defendants or that upon appealing from such

> final judgment, the action of the court below...could not then have been assigned for error. But, obviously, such a course would not have afforded expeditious procedure for the ultimate disposition of the entire controversy.
>
> The test is whether the order in its "practical aspect" is sufficiently final to be appealable. Bell v. Beneficial Consumer Discount Company, 465 Pa. 225, 348 A.2d 734 (1975). An order is "final" if it precludes a party from presenting the merits of his claim to the lower court. Pugar v. Greco, 483 Pa. 68, 394 A.2d 542 (1978). I would therefore consider this cause of action to be appealable because the "practical ramification" is "to completely deprive the litigant of his day in court so far as his claim is concerned." T.C.R. Realty, Inc. v. Cox, 472 Pa. 331, 372 A.2d 721 (1977). (Emphasis added).

Clearly, the dismissal of Count II of Appellant's Complaint precludes her from presenting the merits of that claim to the District Court. The decision of the Court of Appeals denying her appeal further serves to prevent her from

presenting the merits of her claim and therefore, "completely deprives her of her day in court so far as her claim is concerned." T.C.R. Realty, Inc., supra. Therefore, the decision of the Court of Appeals denying her Appeal on the ground of lack of jurisdiction due to lack of finality constituted error and warrants reversal. Furthermore, the cumulative effect of the District Court's dismissal of Count II of Appellant's Complaint and the Court of Appeals' denial of her Appeal serves not only to effectively preclude Appellant from an opportunity to be heard as to Count II, but also to deny her the recovery under the Pennsylvania Consumer Protection Law to which she deems herself entitled.

"The fundamental requirements of due process is the opportunity to be heard

'at a meaningful time and in a meaningful manner'". Mathews v. Eldrige, supra. Due process, at a minimum, requires any reasonable procedure appropriate to the circumstances which fairly protects an individual from arbitrary action. Mathews, supra; Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L.Ed.2d 711 (1977); Burgess v. Miller, 492 F. Supp. 1284 (1980). (Emphasis added).

Due process, unlike some legal rules, is not a rigid concept with a fixed content unrelated to time, place, and circumstances; rather, it is flexible and calls for such procedural protections as the particular situation demands. Jones v. Morris, 541 F. Supp. 11 (1981), citing Mathews, supra at 33, 96 S. Ct. at 902. (Emphasis added). Accordingly, the Mathews court, supra, used the

traditional balancing test to determine whether the procedures involved prior to the deprivation of a property interest were constitutionally sufficient. They stated:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors:
> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Mathews, supra at 335, 96 S. Ct. at 903; Landon v. Plasencia, 103 S. Ct. 321 (1982).

A reading of Talamini's Complaint reflects that the private interest, namely, relief under the Pennsylvania Consumer Protection Law, that has been

affected by the official action, namely, denial of any meaningful presentation of her claim on the merits, is substantial enough so as to warrant that she be permitted an opportunity to be heard prior to being deprived of that interest. Coupling that interest with the risk of an erroneous deprivation of such interest through the procedures used is evidence of the obvious error committed by the Court of Appeals and the process which Appellant is due.

Furthermore, it is elementary that procedural due process is necessitated only if there has been a taking or deprivation of a protected interest. Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548 (1972); Chrysler Corp. v. Fedders Corp., 670 F.2d 1316 (C.A.3d Cir. 1982). If the

Plaintiff satisfies this threshold requirement by showing that he has been deprived of such an interest, the court must then determine whether the Plaintiff was afforded sufficient procedural protection. Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972); Yashon v. Hunt, 696 F.2d 468 (1983).

The Pennsylvania Legislature, in enacting the Consumer Protection Law, supra, provided statutory relief in the nature of treble damages for violations of that Law. The right to that relief for an enumerated violation, therefore, would constitute a protected interest.

Having satisfied the threshold requirement, a determination must be made as to the sufficiency of the procedural protection to which Plaintiff has been

afforded. The effect of the District Court's and Court of Appeals' decisions yields the conclusion that Plaintiff not only has been denied any meaningful procedural protection but also has been deprived of this substantial and protected interest.

Talamini has asserted a valid and substantial cause of action under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, supra. However, the Court of Appeals, following the dismissal by the District Court of Count II of her Complaint (stating a cause of action under the Consumer Protection Law), has denied her the due process of law to which she is reasonably entitled under the Fifth Amendment to the U.S. Constitution, namely, an opportunity to be heard "at a meaningful time and in a

meaningful manner." Mathews, supra. Due process requires, at a minimum, that a litigant be afforded "any reasonable procedure appropriate to the circumstances which fairly protects an individual from arbitrary action." Mathews, supra; Ingraham, supra; Burgess, supra. It also requires consideration of the private interest that will be affected by the official action. Mathews, supra. An assessment of Talamini's interest sought to be protected under the Consumer Protection Law and the Pennsylvania Legislature's intent to provide that relief under the Law, supra, to which she claims entitlement, coupled with the denial of procedural protection to which she is reasonably due, warrants that the

decision of the Court of Appeals be reversed and that the matter be remanded to that Court for a full hearing on the merits.

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IV. Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

October 14, 1983

NO. 83-1625

TALAMINI, FLORENCE, etc.

vs.

ALLSTATE INSURANCE COMPANY

Florence Talamini, Appellant

(E.D.Pa. Civil No. 83-3292)

Present: GIBBONS, HUNTER and GARTH, Circuit Judges.

1. Appellee's motion to dismiss appeal for the reason that this Court does not have jurisdiction to hear this appeal, with costs taxed against appellant.

2. Appellant's response to appellee's motion to dismiss appeal.

in the above-entitled case.

Respectfully,

Deputy Clerk

7-5019

enc.
ad/dt

The foregoing Motion is/~~are~~ granted

By the Court,

/s/ JOHN J. GIBBONS
Judge

Dated: October 24, 1983

ad/cc: Bruce Martin Ginsburg, Esq.
James J. McCabe, Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TALAMINI, FLORENCE, Administratrix of the Estate of TALAMINI, JOHN A., Deceased	:	
VS	:	
ALLSTATE INSURANCE COMPANY	:	NO:

ORDER

AND NOW, this 15th day of August, 1983, for the reasons set forth in the accompanying memorandum, defendant's motion to dismiss count II of the complaint is GRANTED and plaintiff's motion to defer decision on the motion

to dismiss count II and to place this matter in suspense is DENIED.

BY THE COURT:

/s/ CLIFFORD SCOTT GREEN
CLIFFORD SCOTT GREEN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TALAMINI, FLORENCE, Administratrix :
of the estate of TALAMINI, JOHN A., :
Deceased :
:
VS :
:
ALLSTATE INSURANCE COMPANY :

MEMORANDUM

GREEN, J. AUGUST 15, 1983

Pending before the court is the motion of defendant Allstate Insurance Company, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss count II of the complaint for failure to state a claim upon which relief can be granted. Plaintiff filed an answer and a memorandum of law in opposition to the motion. 1/

1/ Count I of the complaint seeks recovery under the Pennsylvania No-Fault Insurance Act, 40 P.S. § 1009.101 et seq.

Defendant argues, and plaintiff concedes, that D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co., 494 Pa. 501, 431 A.2d 966 (1981), precludes a private cause of action for violation of provisions of the Pennsylvania Unfair Insurance Practices Act, 40 P.S. 1171.1 et seq. ("UIPA"). However, plaintiff argues that count II is premised upon a statutory cause of action brought pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Act, and that UIPA is referred to in count II only as a standard by which the conduct of defendant, i.e., the alleged violation of the Uniform Trade Practices and Consumer Protection Law, may be measured.

The Pennsylvania appellate courts have not decided whether a private cause of action for the type of insurance company violations alleged in count II is available under the Trade Practices and Consumer Protection Law. However, the analysis in D'Ambrosia and other decisions of the Pennsylvania courts supports the conclusion that Judge Pollak's decision in Layton v. Liberty Mutual Fire Insurance Company, C.A. 81-2672, slip op. (E.D. Pa. Mar. 18, 1983) is correct and that the Pennsylvania appellate courts will restrict remedies for the type of insurance company misconduct alleged in count II to the Unfair Insurance Practices Act sanctions of the Insurance Commissioner and to private causes of action under the No-Fault Act.

Accordingly, I will grant defendant's motion to dismiss count II of the complaint.

In a letter dated July 21, 1983, plaintiff's counsel requested that this action be transferred to the suspense docket until the appeal in Layton, id. is decided. Defendant objects, claiming it will be prejudiced by the delay because of additional interest penalties to which it will be subject under Pennsylvania law. No purpose is served by placing the action in suspense at this time; therefore, discovery may continue in regard to count I of the complaint. If the decision of the Courts of Appeals in Layton requires reconsideration of the dismissal of count II, plaintiff's counsel may so move. Accordingly, the informal request

to place this matter in suspense will be denied.

IN THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

TALAMINI, Florence, Admini-:
stratrix of the Estate of :
John A. Talamini, Deceased :
Appellant :NO:83-1625
:
VS :
:
ALLSTATE INSURANCE COMPANY :
Appellee :

NOTICE OF APPEAL

TO THE CLERK OF THE COURT OF APPEALS:

Notice is hereby given that the Plaintiff/Appellant, Florence Talamini, Administratrix of the Estate of John A. Talamini, Deceased, appeals the Order entered on the 24th day of October, 1983, granting Appellee Allstate Insurance Company's Motion to Dismiss Appellant's Appeal.

This Appeal is being taken pursuant to 28 U.S.C.A. §1254.

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28 U.S.C.A. §1254 Courts of appeals; certiorari appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.A. §1441 Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisidiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of

action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C.A. §1332 Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjections thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are addition l parties.

40 Pa. C.S.A. §1009.101 et seq.
The Pennsylvania No-Fault Motor Vehicle Insurance Act

NO-FAULT MOTOR VEHICLE INSURANCE [NEW]

The No-fault Motor Vehicle Insurance Act, consisting of sections 1009.101 to 1009.701 of this title, was enacted by Act 1974, July 19, 1974, P.L. 489, No. 176, effective in twelve months, except subsection (a) of section 504 (§1009.504(a)) which became effective immediately.

§1009.102 Findings and Purposes

(a) Findings.-The General Assembly hereby finds and declares that:

(1) motor vehicles are the primary instrumentality for the transportation of individuals;

(2) the transportation of individuals by motor vehicle over Commonwealth highways and other highways

significantly affects intrastate commerce, particularly in metropolitan areas;

(3) the maximum feasible restoration of all individuals injured and compensation of the economic losses of the survivors of all individuals killed in motor vehicle accidents on Commonwealth highways, in intrastate commerce, and in activity affecting intrastate commerce is essential to the humane and purposeful functioning of commerce;

(4) to avoid any undue burden on commerce during the intrastate transportation of individuals, it is necessary and proper to have a Statewide low-cost, comprehensive, and fair system of compensating and restoring motor

vehicle accident victims and the survivors of deceased victims;

(5) exhaustive studies by the United States Department of Transportation, the Congress of the United States and the General Assembly have determined that the present basic system of motor vehicle accident and insurance law, which makes compensation and restoration contingent upon:

(A) every victim first showing that someone else was at fault;

(B) every victim first showing that he was without fault; and

(C) the person at fault having sufficient liability insurance and other available financial resources to pay for all the losses, is not such a low-cost, compresensive, and fair system;

(6) careful studies, intensive hearings, and some State experiments have demonstrated that a basic system of motor vehicle accident and insurance law which:

(A) assures every victim payment of all his basic medical and rehabilitation costs, and recovery of a reasonable amount of work loss, replacement services and survivor's loss; and

(B) eliminates the need to determine fault except when a victim is very seriously injured, is such a low-cost, comprehensive, and fair system;

(7) adoption of the system described in p ragraph (6) in place of the system described in paragraph (5) would remove an undue burden on commerce;

(8) throughout the Commonwealth there should be uniformity as to the essential elements of the system of motor vehicle accident and insurance law to avoid confusion, complexity, uncertainty, and chaos which would be engendered by a multiplicity of noncomplementary systems, but the need for a basic system does not require that the Commonwealth itself directly administer, operate, or direct the administration or operation of such system; and

(9) a Statewide low-cost, comprehensive, and fair system of compensating and restoring motor vehicle accident victims can save and restore the lives of countless victims by providing and paying the cost of services so that every victim has the opportunity to:

(A) receive prompt and comprehensive professional treatment; and

(B) be rehabilitated to the point where he can return as a useful member of society and a self-respecting and self-supporting citizen.

(10) It is necessary to afford required coverages for motor vehicles to economically disadvantaged individuals at rates not so great as to deny such individuals access to insurance which it is necessary for them to have in order to earn income and to be or remain gainfully employed.

(b) Purposes.-Therefore, it is hereby declared to be the policy of the General Assembly to establish at reasonable cost to the purchaser of insurance, a Statewide system of prompt and adequate

basic loss benefits for motor vehicle accident victims and the survivors of deceased victims.

§1009.103 Definitions

As used in this act:

"Added loss benefits" means benefits provided by added loss insurance in accordance with section 207 of this act.

"Allowable expense" means reasonable charges incurred for, or the reasonable value of (where no charges are incurred), reasonably needed and used products, services, and accommodation for:

(A) professional medical treatment and care;

(B) emergency health services;

(C) medical and vocational rehabilitation services;

(D) expenses directly related to the funeral, burial, cremation, or other form of disposition of the remains of a deceased victim, not to exceed one

thousand five hundred dollars ($1,500); and

The term does not include that portion of a charge for a room in a hospital, clinic, convalescent, or nursing home, or any other institution engaged in providing nursing care and related services, in excess of a reasonable and customary charge for semiprivate accommodations, unless more intensive care is medically required; or any amount includable in work loss, replacement services loss, or survivor's loss.

"Basic loss benefits" means benefits provided in accordance with this act for the net loss sustained by a victim, subject to any applicable limitations, exclusions, deductibles, waiting periods,

disqualifications, or other terms and conditions provided or authorized in accordance with this act. Basic loss benefits do not include benefits for damage to property. Nor do basic loss benefits include benefits for net loss sustained by an operator or passenger of a motorcycle.

"Commissioner" means the Insurance Commissioner.

"Department" means the Pennsylvania Department of Transportation.

"Emergency health services" means services necessary to mitigate injury to any victim during the period immediately and proximately following an accident including, but not limited to, communications, transportation, and treatment by medical and paramedical personnel, and

which are supplied or provided by any person accredited or certified by an emergency health services system.

"Emergency health services system" means a system which provides for the arrangement of personnel, facilities, and equipment for the effective and coordinated delivery in an appropriate geographical area of health care services under emergency conditions arising out of the maintenance or use of a motor vehicle, which is administered by a public or nonprofit private entity which has the authority and the resources to provide effective administration, and which is operating in accordance with applicable requirements, conditions, and regulations.

"Government" means the government of the United States, any state, any political subdivision of a state, any instrumentality or two or more States, or any agency, subdivision of a state, any instrumentality of two or more states, or any agency, subdivision, or department of any such government, including any corporation or other association organized by a government for the execution of a government program and subject to control by a government, or any corporation or agency established under an interstate compact or international treaty.

"Injury" means accidentally sustained bodily harm to an individual and that individual's illness, disease, or death resulting therefrom.

"Insurance" means a contract, self-insurance, or any other legally binding obligation to pay or provide no-fault benefits or any required tort liability.

"Insured" means:

(A) an individual identified by name as an insured in a contract of basic loss insurance complying with this act; and

(B) a spouse or other relative of a named insured, a minor in the custody of a named insured, and a minor in the custody of a relative of a named insured if-

(i) not identified by name as an insured in any other contract of basic restoration insurance complying with this act; and

(ii) in residence in the same household with a named insured.

An individual is in residence in the same household if he usually makes his home in the same family unit, even though he temporarily lives elsewhere.

"Insurer" means a legally constituted entity, other than a self-insurer or an obligated government, which is authorized under state law to provide security covering a motor vehicle in such state.

"Loss" means accrued economic detriment resulting from injury arising out of the maintenance or use of a motor vehicle consisting of, and limited to, allowable expense, work loss, replacement services loss, and survivor's lo s.

"Loss of income" means gross income actually lost by a victim or that would have been lost but for any income continuation plan, reduced by:

(A) eighty percent (80%) of any income which such individual earns from substitute work;

(B) income which such individual would have earned in available substitute work he was capable of performing but unreasonably failed to undertake; or

(C) any income which such individual would have earned by hiring an available substitute to perform self-employment services but unreasonably failed to do.

"Maintenance or use of a motor vehicle" means maintenance or use of a

motor vehicle as a vehicle including incident to its maintenance or use as a vehicle, occupying, entering into, or alighting from it. Maintenance or use of a motor vehicle does not include:

(A) conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises; or

(B) conduct in the course of loading or unloading a motor vehicle unless the conduct occurs while occupying, entering into, or alighting from it.

"Medical and vocational rehabilitation services" means services necessary to reduce disability and to restore the physical, psychological,

social, and vocational functioning of a victim. Such services may include, but are not limited to, medical care, diagnostic and evaluation procedures, physical and occupational therapy, other necessary therapies, speech pathology or audiology, optometric services, nursing care under the supervision of a registered nurse, medical social services, vocational rehabilitation and training services, occupational licenses and tools, and transportation where necessary to secure medical and vocational rehabilitation services. A basic loss obligor is not obligated to provide basic loss benefits for allowable expense for medical and vocational rehabilitation services unless the facility in which or through which such

services are provided has been accredited by the Department of Health, the equivalent governmental agency responsible for health programs, or the accrediting designee of such department or agency of the State in which such services are provided, as being in accordance with applicable requirements and regulations.

"Motor vehicle" means a vehicle of a kind required to be registered under the act of April 29, 1959 (P.L. 58, No 32), known at The Vehicle Code.

"Net loss" means loss less benefits or advantages required to be subtracted from loss in calculating net loss pursuant to this act.

"Noneconomic detriment" means pain, suffering, inconvenience, physical

impairment, and other nonpecuniary damage recoverable under the tort law applicable to injury arising out of the maintenance or use of a motor vehicle. The term does not include punitive or exemplary damages.

"No-fault benefits" means basic loss benefits, added loss benefits, or both.

"No-fault insurance" means basic loss insurance, added loss insurance, or both.

"Obligor" means an insurer, self-insurer, or obligated government providing no-fault benefits in accordance with this act.

"Owner" means an individual, government, corporation, company, association, firm, partnership, joint stock company, foundation, institution,

society, union, club, church, or any other group of persons organized for any purpose, other than a lienholder or secured party, that owns or has title to a motor vehicle or is entitled to the use and possession of a motor vehicle subject to a security interest held by another. The term includes a lessee of a motor vehicle having the right to possession under a lease with option to purchase.

"Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the victim would have performed, not for income, but for the benefit of himself or his family, if he had not been injured.

"Secretary" means the Pennsylvania Secretary of Transportation.

"Secured vehicle" means a motor vehicle for which security is provided in accordance with section 104 of this act.

"Security covering a motor vehicle," "security covering the vehicle," and "security" means the security which is provided in accordance with section 104 of this act.

"Self-insurer" means an owner or any person providing security pursuant to subsection (b) or (c) of section 104 of this act.

"State" means a state of the United States, the District of Columbia, Guam, and the Virgin Islands.

"State vocational rehabilitation agency" means the agency in the Commonwealth which administers the Commonwealth plan for vocational

rehabilitation services under the Federal Vocational Rehabilitation Act. (29 U.S.C. 35)

"Survivor" means:

(A) spouse; or

(B) child, parent, brother, sister or relative dependent upon the deceased for support.

"Survivor's loss" means the:

(A) loss of income of a deceased victim which would probably have been contributed to a survivor or survivors if such victim had not sustained the fatal injury; and

(B) expenses reasonably incurred by a survivor or survivors, after a victim's death resulting from injury, in obtaining ordinary and necessary services in lieu of those which

the victim would have performed, not for income, but for their benefit, if he had not sustained the fatal injury, reduced by expenses which the survivor or survivors would probably have incurred but avoided by reason of the victim's death resulting from injury.

"Victim" means an individual who suffers injury arising out of the maintenance or use of a motor vehicle; "deceased victim" means a victim suffering death resulting from injury.

"Without regard to fault" means irrespective of fault as a cause of injury.

"Work loss" means:

(A) loss of gross income of a victim, as calculated pursuant to the

provisions of section 205 of this act; and

(B) reasonable expenses of a victim for hiring a substitute to perform self-employment services, thereby mitigating loss of income, or for hiring special help, thereby enabling a victim to work and mitigate loss of income.

§1009.104 Required motor vehicle insurance

(a) Security covering a motor vehicle-Every owner of a motor vehicle which is registered or which is operated in this Commonwealth by the owner or with his permission, shall continuously provide security covering such motor vehicle while such vehicle is either present or registered in the Commonwealth. Security shall be provided

for the payment of basic loss benefits, and for the payment of sums up to a total limit of thirty thousand dollars ($30,000) which the owner or any person operating the vehicle with the express or implied permission of the owner may become liable to pay as damages because of bodily injury or death arising out of any one accident (subject to a sublimit of fifteen thousand dollars ($15,000) for damages arising out of the bodily injury or death of any one person) and for the payment of damages for injury to or destruction of property in any one accident of amounts up to a total limit of five thousand dollars ($5,000). The owner or any other person may provide security covering a motor vehicle by a contract of insurance with an insurer or

by qualifying as a self-insurer or as an obligated government.

(b) Self-insurance.-Self-insurance, subject to approval of the commissioner and department, is effected by filing with the department in satisfactory form:

(1) a continuing undertaking by the owner or other appropriate person to pay basic restoration benefits and any tort liability required in amounts not less than those required, by subsection (a) of this section, to perform all obligations imposed in accordance with this act, and to elect to pay such added restoration benefits as are specified in the undertaking;

(2) evidence that appropriate provision exists for prompt and efficient administration of all claims, benefits,

and obligations provided in accordance with this act; and

(3) evidence that reliable financial arrangements, deposits, resources, or commitments exist providing assurance substantially equivalent to that afforded by a contract of insurance complying with this act for payment of no-fault benefits, any required tort liability, and performance of all other obligations imposed in accordance with this act.

(c) Obligated government.-A government may provide security with respect to any motor vehicle owned or operated by it by lawfully obligating itself to pay basic restoration benefits in accordance with this act, and such

added restoration benefits as are specified in the undertaking.

(d) Obligations upon termination of security.-An owner of a motor vehicle who ceases to maintain the security required in accordance with this act shall immediately surrender the registration certificate and license plates for the vehicle to the department and may not operate or permit operation of the vehicle in this Commonwealth until security has again been furnished as required in accordance with this act. A person other than the owner who ceases to maintain such security shall immediately notify the owner and the department, who may not operated or permit operation of the vehicle until security has again been furnished. An insurer who has issued a

contract of insurance and knows or has reason to believe the contract is for the purpose of providing security shall immediately give notice to the department of the termination of the insurance. If the commissioner or department withdraws approval of security provided by a self-insurer or knows that the conditions for self-insurance have ceased to exist, he shall immediately give notice thereof to the department. These requirements may be modified or waived by the department.

§1009.105 Availability of insurance

(a) Plan.-

(1) The commissioner shall establish and implement or approve and supervise a plan assuring that any required no-fault benefits and tort

liability coverage for motor vehicles will be conveniently and expeditiously available, subject only to payment or provisions for payment of the premium, to each individual who cannot conveniently obtain insurance through ordinary methods at rates not in excess of those applicable to similarly situated individuals under the plan. The plan may provide reasonable means for the transfer of individuals insured thereunder into the ordinary market, at the same or lower rates, pursuant to regulations established by the commissioner. The plan may be implemented by assignment of applicants among insurers, pooling, any joint insuring or reinsuring arrangement, or any other method, that results in all applicants being conveniently afforded

the insurance coverages on reasonable and not unfairly discriminatory terms.

(2) The plan shall make available added loss benefits and tort liability coverage together with other contract provisions which the commissioner determines are reasonably needed by applicants and are commonly afforded in voluntary markets. The plan must also assure that there is available through the private sector or otherwise to all applicants adequate premium financing or provision for the installment payment of premiums subject to customary terms and conditions.

(3) All insurers writing no-fault benefits and tort liability coverages in this Commonwealth shall participate in the plan. The plan shall provide for

equitable apportionment, among all participating insurers writing any insurance coverage required under the plan, of the financial burdens of insurance provided to applicants under the plan and the costs of operation of the plan.

(4) Subject to the supervision and approval of the commissioner, insurers may consult and agree with each other and with other appropriate persons as to the organization, administration, and operation of the plan and as to rates and rate modifications for insurance coverages provided under the plan. Rates and rate modifications adopted or charged for insurance coverages provided under the plan shall:

(A) be first adopted or approved by the commissioner; and

(B) be reasonable and not unfairly discriminatory among similarly situated applicants for insurance pursuant to regulations established by the commissioner.

(5) To carry out the objectives of this subsection, the commissioner may adopt rules, make orders, enter into agreements with other governmental and private entities an individuals, and form and operate or authorize the formation and operation of bureaus and other legal entitles.

(b) Cancellation, refusal to renew, or other termination of insurance.- Cancellation, refusal to renew and other termination of insurance shall

be provided for in accordance with the provisions of the act of June 5, 1968 (P.L. 140, No. 78) entitled "An act regulating the writing, cancellation of or refusal to renew policies of automobile insurance; and imposing powers and duties on the Insurance Commissioner thereof."

§1009.106 Payment of claims for no-fault benefits

(a) In general.-

(1) No-fault benefits are payable monthly as loss accrues. Loss accrues not when injury occurs, but as allowable expenses, work loss, replacement services loss, or survivor's loss is sustained.

(2) No-fault benefits are overdue if not paid within thirty days

after the receipt by the obligor of each submission of reasonable proof of the fact and amount of loss sustained, unless the obligor designates, upon receipt of an initial claim for no-fault benefits, periods not to exceed thirty-one days each for accumulating all such claims received within each such period, in which case such benefits are overdue if not paid within fifteen days after the close of each such period. If reasonable proof is supplied as to only part of a claim, but the part amounts to one hundred dollars ($100) or more, benefits for such part are overdue if not paid within the time mandated by this paragraph. An obligation for basic loss benefits for an item of allowable expense may be discharged by the obligor by

reimbursing the victim or by making direct payment to the supplier or provider of products, services, or accommodations within the time mandated by this paragraph. Overdue payments bear interest at the rate of eighteen per cent (18%) per annum.

(3) A claim for no-fault benefits shall be paid without deduction for the benefits or advantages which are to be subtracted from loss in calculating net loss if such benefits or advantages have not been paid or provided to such claimant prior to the date the no-fault benefits are overdue or the no-fault benefits claim is paid. The obligor is thereupon entitled to recover reimbursement from the person obligated to pay or provide such benefits or

advantages or from the claimant who actually received them.

(4) An obligor may bring an action to recover reimbursement for no-fault benefits which are paid upon the basis of an intentional misrepresentation of a material fact by a claimant or a supplier or provider of an item of allowable expense, if such obligor reasonably relied upon such misrepresentation. The action may be brought only against such supplier or provider, unless the claimant has intentionally misrepresented the facts or knew of the misrepresentation. An obligor may offset amounts he is entitled to recover from the claimant under this paragraph against any no-fault benefits otherwise due.

(5) An obligor who rejects a claim for basic loss benefits shall give to the claimant written notice of the rejection promptly, but in no event more than thirty days after the receipt of reasonable proof of the loss. Such notice shall specify the reason for such rejection and inform the claimant of the terms and conditions of his right to obtain an attorney. If a claim is rejected for a reason other than the person is not entitled to basic loss benefits claimed, the written notice shall inform the claimant that he may file his claim with the assigned claims bureau and shall give the name and address of the bureau.

(b) Release or settlement of claim.-

(1) Except as otherwise provided in this subsection, no-fault benefits shall not be denied or terminated because the victim executed a release or other settlement agreement. A claim for no-fault benefits may be discharged by a settlement agreement for an agreed amount payable in installments or in a lump sum, if the reasonably anticipated net loss does not exceed two thousand five hundred dollars ($2,500). In all other cases, a claim may be discharged by a settlement to the extent authorized by law and upon a finding, by a court of competent jurisdiction, that the settlement is in the best interest of the claimant and any beneficiaries of the settlement, and that the claimant understands and consents to such settlement, and upon payment by the

restoration obligor of the costs of such proceeding including a reasonable attorney's fee (based upon actual time expended) to the attorney selected by or appointed for the claimant. Such costs may not be charged to or deducted from the proceeds of the settlement. Upon approval of the settlement, the court may make appropriate orders concerning the safeguarding and disposing of the proceeds of the settlement and may direct as a condition of the settlement agreement, that the restoration obligor pay the reasonable cost of appropriate future medical and vocational rehabilitation services.

(2) A settlement agreement for an amount payable in installments shall be modified as to amounts to be paid in the

future, if it is shown that a material and substantial change of circumstances has occurred or that there is newly-discovered evidence concerning the claimant's physical condition, loss, or rehabilitation which could not have been known previously or discovered in the exercise of reasonable diligence.

(3) A settlement agreement may be set aside if it is procured by fraud or if its terms are unconscionable.

(c) Time limitations on actions to recover benefits.-

(1) If no-fault benefits have not been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two years after the victim suffers the loss and either knows, or in the exercise of reasonable

diligence should have known, that the loss was caused by the accident, or not later than four years after the accident, whichever is earlier. If no-fault benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant; may be commenced not later than two years after the last payment of benefits.

(2) If no-fault benefits have not been paid to the deceased victim or his survivor or survivors, an action for survivor's benefits may be commenced not later than one year after the death or four years after the accident from which death results, whichever is earlier. If survivor's benefits have been paid to any

survivor, an action for further survivor's benefits by either the same or another claimant may be commenced not later than two years after the last payment of benefits. If no-fault benefits have been paid for loss suffered by a victim before his death resulting from the injury, an action for survivor's benefits may be commenced not later than one year after the death or six years after the last payment of benefits, whichever is earlier.

(3) If timely action for basic restoration benefits is commenced against an obligor and benefits are denied because of a determination that the obligor's coverage is not applicable to the claimant under the provisions of section 204 of this act, an action

against the applicable obligor or the obligor to whom a claim is assigned under an assigned claims plan may be commenced not later than sixty days after the determination becomes final or the last date on which the action could otherwise have been commenced, whichever is later.

(4) Except as paragraph (1), (2), or (3) prescribes a longer period, an action by a claimant on an assigned claim which has been timely presented in accordance with the provisions of section 108(c) of this act may not be commenced more than sixty days after the claimant receives written notice of rejection of the claim by the restoration obligor to which it was assigned.

(5) If a person entitled to no-fault benefits is under a legal

disability when the right to being an action for the benefits first accrues, the period of his disability is not a part of the time limited for commencement of the action.

(d) Assignment of benefits.-Omitted

§1009.107 Attorney's fees and costs

Fees of claimant's attorney-

(1) If any overdue no-fault benefits are paid by the obligor after receipt by the obligor of notice of representation of a claimant in connection with a claim or action for the payment of no-fault benefits, a reasonable attorney's fees (based on actual time expended) shall be paid by the obligor to such attorney. No part of the attorney's fee for representing the claimant in connection with such claim or

action for no-fault benefits shall be charged or deducted from benefits otherwise due to such claimant and no part of such benefits may be applied to such fee.

(2) If, in any action by a claimant to recover no-fault insurance benefits from an obligor, the court determines that the claim or any significant part thereof is fraudulent or so excessive as to have no reasonable foundation, the court may award the obligor's attorney a reasonable fee based upon actual time expended. The court, in such case, may direct that the fee shall be paid by the claimant or that the fee may be treated in whole or in part as an offset against any benefits due or to become due to the claimant.

(3) If, in any action by a claimant to recover no-fault benefits from an obligor, the court determines that the obligor has denied the claim or any significant part thereof without reasonable foundation, the court may award the claimant's attorney a reasonable fee based upon actual time expended.

§1009.108 Assigned claims plan-Omitted

§1009.109 Rates-Omitted

§1009.110 Motor vehicles in interstate travel-Omitted

§1009.111 Rights and duties of obligor

(a) Reimbursement and subrogation.

(1) Except as provided in paragraphs (2) and (3) of this subsection, an obligor:

(A) does not have and may not contract, directly or indirectly, in whole or in part, for a right of reimbursement from or subrogation to the proceeds of a victim's claim for relief or to a victim's cause of action for noneconomic detriment; and

(B) may not directly or indirectly contract for any right of reimbursement based upon a determination of fault from any other obligor not acting as a reinsurer for no-fault benefits which it has paid or is obligated to pay as a result of injury to a victim.

(2) Whenever an individual who receives or is entitled to receive no-fault benefits for an injury has a claim or cause of action against any

other person causing the injury as based upon a determination of fault, the obligor is subrogated to the rights of the claimant only for:

(A) elements of damage compensated for by security for the payment of no-fault benefits in excess of the minimum basic loss benefits required under this act are recoverable; and

(B) the obligor has paid or become obligated to pay accrued or future no-fault benefits in excess of the minimum basic loss benefits required under this act.

(3) Nothing in this subsection shall preclude any person supplying or providing products, services, or accommodations from contracting or otherwise providing for a right of

reimbursement to any basic restoration benefits for allowable expense.

(4) In no event shall any entity providing benefits other than no-fault benefits to an individual as described in section 203 of this act, have any right of subrogation with respect to said benefits.

(b) Duty to pay basic loss benefits.-An obligor providing security for the payment of basic loss benefits shall pay or otherwise provide such benefits without regard to fault to each individual entitled thereto, pursuant to the terms and conditions of this act.

(c) Indemnity.-Omitted

(d) Referral for rehabilitation services.-Omitted

ARTICLE II. RIGHTS TO BENEFITS

§1009.201 Right to basic loss benefits; limitation on benefits

(a) Accident within this State.-If the accident resulting in injury occurs in this Commonwealth, any victim or any survivor of a deceased victim is entitled to receive basic loss benefits in accordance with the provisions of this act.

(b) Accident outside this State.-Omitted

§1009.202 Basic loss benefits

(a) Allowable expense limits.-Allowable expense, as defined in section 103 of this act shall be provided or the equivalent in the form of a contract to provide for services required.

(b) Work loss limits.-Work loss, as defined in section 103 shall be provided:

(1) up to a monthly maximum of:

(A) one thousand dollars($1,000) multiplied by a fraction whose numerator is the average per capita income in this Commonwealth and whose denominator is the average per capita income in the United States, according to the latest available United States Department of Commerce figures; or

(B) the disclosed amount, in the case of a named insured who, prior to the accident resulting in injury, voluntarily discloses his actual monthly earnings to his obligor and agrees in writing with such obligor that such sum shall measure work loss; and

(2) up to a total amount of fifteen thousand dollars ($15,000).

(c) Replacement services losses.- Replacement services loss, as defined in section 103 shall be provided up to a daily maximum of twenty-five dollars ($25) for an aggregate period of one year.

(d) Survivors losses.-Survivors loss, as defined in section 103 shall be provided in an amount not to exceed five thousand dollars ($5,000).

(e) Deductibles; waiting period.- Allowable expense, work loss and replacement services loss may include provisions to provide:

(1) a deductible not tc exceed on hundred dollars ($100) for each individual; or

(2) with respect to work loss or replacement services only, a waiting period not to exceed one week.

Such deductible or waiting period shall be elected in writing upon a form approved by the Insurance Commissioner and, if elected, shall be effective only as against the named insured and his or her immediate family.

§1009.203 Collateral benefits

(a) If benefits other than no-fault benefits are provided to an individual through a program, group, contract or other arrangement for which some other person pays in whole or in part that would inure to the benefit of a victim or the survivor of a deceased victim injured as a result of an accident in the absence of no-fault benefits, then any reduction

or savings in the direct or indirect cost to such person of such benefits resulting from the existence of no-fault benefits shall be returned to such individual or utilized for his benefit.

(b) The owner or operator of a motor vehicle may elect to provide for security in whole or in part for the payment of basic loss benefits through a program, group, contract or other arrangement that would pay to or on behalf of the victim or members of his family residing with him or the survivor of a deceased victim, allowable expense, loss of income, work loss, replacement services loss and survivors loss. In all such instances, each contract of insurance issued by an insurer shall be construed to contain a provision that all

benefits provided therein shall be in excess of any valid and collectible benefits otherwise provided throughs such program, group, contract or other arrangement as designated at the election of the owner or operator which shall be primary.

(c) An insurer providing basic loss benefits and tort liability in accordance with the provisions of subsection (b) above shall reduce the cost of such contract of insurance to reflect the anticipated reduction in basic loss benefits payable by the insurer by reason of the election of the owner or operator to provide substitute security.

§1009.204 Source of basic restoration benefits

(a) Applicable security.-The security for the payment of basic loss benefits applicable to an injury to:

(1) an employee, or to the spouse or other relative of any employee residing in the same household as the employee, if the accident resulting in injury occurs while the victim or deceased victim is driving or occupying a motor vehicle furnished by such employee's employer is the security for the payment of basic loss benefits covering such motor vehicle or, if none, any other security applicable to such victim;

(2) an insured is the security under which the victim or deceased victim is insured;

(3) the driver or other occupant of a motor vehicle involved in any accident resulting in injury who is not an insured is the security covering such vehicle;

(4) an individual who is not an insured or the driver or other occupant of a motor vehicle involved in an accident resulting in injury is the security covering any motor vehicle involved in such accident. For purposes of this paragraph, a parked and unoccupied motor vehicle is not a motor vehicle involved in an accident, unless it was parked so as to cause unreasonable risk of injury; and

(5) any other individual is the applicable assigned claims plan.

(b) Multiple sources of equal property.-If two or more obligations to pay basis loss benefits apply equally to an injury under the priorities set forth in subsection (a) of this section, the obligor against whom a claim is asserted first shall process and pay the claim as if wholly responsible. Such obligor is thereafter entitled to recover contribution pro rata from any other such obligor for the basic loss benefits paid and for the costs of processing the claim. If contribution is sought among obligors responsible under paragraph (4) of subsection (a) of this section proration shall be based on the number of involved motor vehicles.

§1009.205 Work loss

(a) Regularly employed.-The work loss of a victim whose income prior to the injury was realized in regular increments shall be calculated by:

(1) determining his probable weekly income by dividing his probable annual income by fifty-two; and

(2) multiplying that quantity by the number of work weeks, or fraction thereof, the victim sustains loss of income during the accrual period.

(b) Seasonably employed.-The work loss of a victim whose income is realized in irregular increments shall be calculated by:

(1) determining his probable weekly income by dividing his probable annual income by the number of weeks he normally works; and

(2) multiplying that quantity by the number of work weeks, or fraction thereof, the victim was unable to perform and would have performed work during the accrual period but for the injury.

(c) Not employed.-The work loss of a victim who is not employed when the accident resulting in injury occurs shall be calculated by:

(1) determining his probable weekly income by dividing his probable annual income by fifty-two; and

(2) multiplying that quantity by the number of work weeks, or fraction thereof, if any, the victim would reasonably have been expected to realize income during the accrual period.

(d) Definitions.-As used in this section:

"Probably annual income" means, absent a showing that it is or would be some other amount, the following:

(A) twelve times the monthly gross income earned by the victim from work in the month preceding the month in which the accident resulting in injury occurs, or the average annual income earned by the victim from work during the years, not to exceed three, preceding the year in which the accident resulting in injury occurs, whichever is greater, for a victim regularly employed at the time of the accident;

(B) the average annual gross income earned by the victim from work during the years in which he was employed, not to exceed three, preceding the year in which the accident resulting

in injury occurs, for a victim seasonably employed or not employed at the time of the accident; or

(C) the average annual gross income of a production or nonsupervisory worker in the private nonfarm economy in the state in which the victim is domiciled for the year in which the accident resulting in injury occurs, for a victim who has not previously earned income from work.

"Work week" means the number of days an individual normally works in a seven-day period; "weekly income" means income earned during a work week.

§1009.206 Net loss-Omitted

§1009.207 Added loss benefits

(a) Mandatory offering.-Obligors providing security for the payment of

basic loss benefits shall offer or obligate themselves to provide added loss benefits for injury or damage arising out of the ownership, maintenance, or use of a motor vehicle, including:

(1) loss excluded from basic loss benefits by limits on allowable expense, work loss, replacement services loss, and survivor's loss;

(2) benefits for damage to property;

(3) benefits for loss of use of a motor vehicle;

(4) benefits for expense for remedial religious treatment and care;

(5) for physical damage to a motor vehicle, a coverage for all collision and upset damage, subject to an optional deductible; and

(6) for economic detriment, a coverage for work loss sustained by a victim in excess of limitations on basic loss benefits for work loss.

(b) Additional loss coverage.- Subject to the approval of terms and forms by the commissioner, obligors may offer or obligate themselves to provide other added loss coverages.

The commissioner may adopt rules requiring that insurers providing basic loss insurance offer, in accordance with this act, any other specified added loss coverages and promulgate regulations will respect thereto.

§1009.208 Ineligible claimants-Omitted

§1009.209 Other provisions

(a) Included coverage.-A contract of insurance covering liability arising

out of the ownership, maintenance, or use of a motor vehicle registered in this Commonwealth, shall include basic loss benefits and any other benefit coverages required by the no-fault plan for motor vehicle insurance in effect in this Commonwealth unless such contract provides tort liability coverages only in excess of any of those required by the no-fault plan.

(b) Approval of terms and forms.-Terms and conditions (including forms used by insurers) of any contract, certificate, or other evidence of insurance sold or issued pursuant to this State's no-fault plan for motor vehicle insurance in accordance with this act and providing no-fault benefits or any required tort liability are subject to

approval and regulation by the commissioner. The commissioner shall approve only terms and conditions which are consistent with the purposes of this act and fair and equitable to all persons whose interest may be affected. The commissioner may reasonably limit by rule the variety of coverage available in order to give purchasers of insurance a reasonable opportunity to compare the cost of insuring with various insurers.

ARTICLE III. TORT LIABILITY

§1009.301 Tort Liability-Omitted

ARTICLE IV. EXAMINATION, TREATMENT AND REHABILITATION OF INJURED PERSONS: DISCOVERY

§1009.401 Examination-Omitted

§1009-402 Report of examination-Omitted

§1009.403 Refusal to comply-Omitted

§1009.404 Court order; obligor responsibility-Omitted

§1009.405 Court order; rehabilitative training-Omitted

§1009.406 Compliance with court order-Omitted

§1009.407 Customary charges for treatment-Omitted

§1009.408 Earings statement-Omitted

ARTICLE V-UNINSURED MOTORISTS, ANTI-DISCRIMINATION, SECURITY REQUIRED CANCELLATION, SUBROGATION, RATE REDUCTION, SELF INSURANCE, TERMINATION OF SECURITY, CONSUMER INFORMATION, SEVERABILITY

§1009.501 Uninsured motorist-Omitted

§1009.502 Anti-discrimination

There shall be no unfair discrimination by insurers in eligibility rules and underwriting practices by reason of race, religion, nationally or ethnic group, age, sex, family size, occupation, place of residence or marital status. The terms "eligibility rules and underwriting practices" do not include the making or promulgation of rates if made and promulgated in accordance with the appropriate rate regulatory act of this Commonwealth and regulations pursuant thereto as promulgated by the commissioner.

§1009.503 Separability-Omitted

§1009.504 Policy requirements and premium changes-Omitted

§1009.505 Roll on benefits-Omitted

ARTICE VI. PENALTIES

§1009.601 Operation of a vehicle without security-Omitted

§1009.602 Excessive charges-Omitted

§1009.603 Violations by obligor

Any obligor who shall advertise, offer or contract for, or otherwise provide for no-fault benefits or tort liability insurance coverages required by this act, and who, by a pattern of business transactions violates any of the provisions of this act, shall be guilty of a summary offense and upon conviction thereof shall be sentenced to pay a fine of not more than one thousand dollars ($1,000) for each violation.

§1009.701 Effective date

This act shall take effect in twelve months: Provided, however, That subsection (a) of section 504 shall take effect immediately.

1974, July 19, P.L. 489, No. 176, Art. VII, §701, effective in 12 months.

73 Pa. C.S.A. §201-1 et seq. Pennsylvania Unfair Trade Practices and Consumer Protection Law

UNFAIR COMPETITION ACTS OR PRACTICES

§201-1. Short title

This act shall be known and may be cited as the "Unfair Trade Practices and Consumer Protection Law."

§201-2. Definitions

As used in this act.

(1) "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording, wherever situate.

(2) "Person" means natural persons, corporations, trust, partnerships, incorporated or unincorporated associations, and any other legal entities.

(3) "Trade" and "commerce" mean the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.

(4) "Unfair methods of competition" and "unfair or deceptive acts or practices" means any one or more of the following:

(i) Passing off goods or services as those of another;

(ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

(iv) Using deceptive representations or designations of geographic origin in connection with goods or services;

(v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

(vi) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

(vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

(viii) Disparaging the goods, services or business of another by false or misleading representation of fact;

(ix) Advertising goods or services with intent not to sell them as advertised;

(x) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(xi) Making false or misleading statements of fact concerning the reasons

for, existence of, or amounts of price reductions;

(xii) Promising or offering prior to time of sale to pay, credit or allow to any buyer, any compensation or reward for the procurement of a contract for purchase of goods or services with another or others, or for the referral of the name or names of another or others for the purpose of attempting to procure or procuring such a contract of purchase with such other person or persons when such payment, credit, compensation or reward is contingent upon the occurrence of an event subsequent to the time of the signing of a contract to purchase;

(xiii) Promoting or engaging in any plan by which goods or services are sold to a person for a consideration and upon

the further consideration that the purchaser secure or attempt to secure one or more persons likewise to join the said plan; each purchaser to be given the right to secure money, goods or services depending upon the number of persons joining the plan. In addition, promoting or engaging in any plan, commonly known as or similar to the so-called "Chain-Letter Plan" or "Pyramid Club." The terms "Chain-Letter Plan" or "Pyramid Club" mean any scheme for the disposal or distribution of property, services or anything of value whereby a participant pays valuable consideration, in whole or in part, for an opportunity to receive compensation for introducing or attempting to introduce one or more additional persons to participate in the

scheme or for the opportunity to receive compensation when a person introduced by the participant introduces a new participant. As used in this subclause the term "consideration" means an investment of cash or the purchase of goods, other property, training or services, but does not include payments made for sales demonstration equipment and material for use in making sales and not for resale furnished at no profit to any person in the program or to the company or corporation, nor does the term apply to a minimal initial payment of twenty-five dollars ($25) or less;

(xiv) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to

or after a contract for the purchase of goods or services is made;

(xv) Knowingly misrepresenting that services, replacements or repairs are needed if they are not needed;

(xvi) Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing;

(xvii) Engaging in any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding.

§201-3. Unlawful acts or practices; exclusions

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as

defined by subclauses (i) through (xvii) of clause (4) of section 2 of this act and regulations promulgated under section 3.1 of this act are hereby declared unlawful. The provisions of this act shall not apply to any owner, agent or employe of any radio or television station, or to any owner, publisher, printer, agent or employe of a newspaper or other publication, periodical or circular, who, in good faith and without knowledge of the falsity or deceptive character thereof, publishes, causes to be published or takes part in the publication of such advertisement.

§201-3.1 Regulations-Omitted

§201-4. Restraining prohibited acts

Whenever the Attorney General or a District Attorney has reason to

believe that any person is using or is about to use any method, act or practice declared by section 3 of this act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the Commonwealth against such person to restrain by temporary or permanent injunction the use of such method, act or practice.

§201-4.1 Payment of costs and restitution

Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in section 4 above, the court may in its discretion direct that the defendant or defendants restore to any persons in interest any moneys or property, real or personal, which may

have been acquired by means of any violation of this act, under terms and conditions to be established by the court.

§201-5. Assurances of voluntary compliance-Omitted

§201.7. Contracts; effect of rescission-Omitted

§201.8. Civil penalties

(a) Any person who violates the terms of an injunction issued under section 4 of this act or any of the terms of an assurance of voluntary compliance duly filed in court under section 5 of this act shall forfeit and pay to the Commonwealth a civil penalty of not more than five thousand dollars ($5,000) for each violation. For the purposes of this section the court issuing an injunction

or in which an assurance of voluntary compliance is filed shall retain jurisdiction, and the cause shall be continued: and, in such cases, the Attorney General, or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may petition for recovery of civil penalties and any other equitable relief deemed needed or proper.

(b) In any action brought under section 4 of this act, if the court finds that a person, firm or corporation is wilfully using or has wilfully used a method, act or practice declared unlawful by section 3 of this act, the Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may

recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty of not exceeding one thousand dollars ($1,000) per violation, which civil penalty shall be in addition to other relief which may be granted under section 4 and 4.1 of this act.

§201-9. Forfeiture of franchise or right to do business; appointment of receiver-Omitted

§201-9.1 Powers of receiver-Omitted

§201-9.2 Private actions

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act

or practice declared unlawful by section 3 of this act may bring a private action, to recover actual damages or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper.

(b) Any permanent injunction, judgment or order of the court made under section 4 of this act shall be prima facie evidence in an action brought under section 9.2 of this act that the defendant used or employed acts or practices declare unlawful by section 3 of this act.

28 U.S.C.A. Rule 12(b)(6)

Defenses and Objections-When and How Presented - By Pleading or Motion - Motion for Judgment on the Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:..., (6) failure to state a claim upon which relief can be granted,...